

any, or failing issue to his surviving sisters. This I believe to be the proper construction of the two writs read together; and by so reading them I think we shall give effect to the true intention of the truster without doing undue violence to the language used.

The LORD JUSTICE-CLERK and LORD YOUNG concurred.

LORD TRAYNER was absent.

The Court pronounced the following interlocutor:—

“Dismiss the appeal and affirm the interlocutor appealed against: Therefore of new assolvie the defenders from the conclusions of the action, and decern: Find the pursuer liable in expenses in this Court.” &c.

Counsel for the Pursuer and Appellant—Shaw, Q.C.—Munro. Agents—Douglas & Miller, W.S.

Counsel for the Defenders and Respondents—Dundas. Agents—Mackenzie & Black, W.S.

Wednesday, March 10.

## FIRST DIVISION.

[Glasgow Dean of Guild Court.

### WADDELL v. WHYTE.

*Burgh — Street — Height of Buildings — Glasgow Police Act 1866 (29 and 30 Vict. cap. cclxxiii.), secs. 290 and 291.*

Section 290 of the Glasgow Police Act 1866 enacts that every proprietor who intends to lay out or form any street shall make application to the Dean of Guild for warrant to do so, stating in his application what is the maximum height of the buildings to be erected. It further provides that it shall not be lawful for any applicant, without the authority of the Dean of Guild, to erect in the street any building other than a dwelling-house the front wall of which shall exceed the width of such street by more than one-fourth part thereof. Section 291 enacts that the applicant shall acquiesce in and fulfil any conditions imposed by the Dean of Guild with reference to the height of the buildings relatively to the width of the street.

*Held* that these sections impose no perpetual limitation upon the height of the buildings in the street, for which, thereunder, the Dean of Guild has granted a lining, and consequently that it is competent for the Dean of Guild to grant warrant to an applicant under section 364 of the statute for the erection of buildings other than dwelling-houses 70 feet high in a public street 60 feet in width, on the laying-out of which 24 years previously it was

proposed by the applicant to erect buildings only 60 feet high.

Robert Davidson Waddell, sausagemaker, Glasgow, applied to the Dean of Guild Court of that city for warrant and decree of lining for the erection of business premises in the place of certain existing buildings on the west side of Napiershall Street and north side of North Woodside Road.

John Whyte, Master of Works of the city of Glasgow, lodged objections, in which, after citing section 290 of the Glasgow Police Act 1866, he averred that the petitioner's authors had in 1872 obtained warrant from the Dean of Guild to lay out certain streets, including Napiershall Street; that Napiershall Street was lined as a public street 60 feet in width; that in the petition presented by the petitioner's authors it was stated that the maximum height of the buildings intended to be erected on the line of Napiershall Street was 60 feet; and that the buildings proposed to be erected by the present petitioner were shown on his plans as 70 feet in height. He accordingly maintained “that it is not in the power of the Dean of Guild to grant warrant for the erection of buildings higher than those authorised in the original lining of said streets,” and that the petition should be dismissed.

The petitioner in answer referred to the statute, averred that the buildings for which warrant was granted in 1872 were dwelling-houses, whereas the building proposed to be erected by him was not a dwelling-house, and maintained that the objections were irrelevant.

The Glasgow Police Act 1866 (29 and 30 Vict. cap. cclxxiii.), sec. 290, enacts—“Every proprietor who intends to lay out or to form any street shall make application to the Dean of Guild for a warrant to do so, and every proprietor who has already laid out or formed any street on which no building has been erected shall make application to the Dean of Guild for a warrant to sanction such street, and in either case the proprietor shall state in his application whether such street is intended to be a public street or a private street, and what is the maximum height above its level of the buildings intended to be erected, and shall produce along with such application a plan and longitudinal section of such street, and a plan with cross sections at right angles to such street, of the lands adjoining the same, and the Dean of Guild shall cause the Master of Works and any other person whom he considers interested to be cited, and allow them time to examine the said plans and sections, and lodge answers or be heard with respect to the application.” There follows a proviso that the magistrates may issue a warrant declaring such street to be a public street, “but it shall not be lawful for the proprietor of any land or heritage adjoining any street which is laid out or formed, without an application to the Dean of Guild, to erect thereon any dwelling-house the front walls of which shall exceed in height the width of such street, nor

without the express authority of the Dean of Guild to erect thereon any other building the front walls of which shall exceed in height the width of such street by more than the fourth part thereof."

Section 291—"If the application to the Dean of Guild relates to an intended public street, and is granted by him, the proprietor making such application shall acquiesce in and fulfil any conditions which he may impose with reference to the following matters, namely—with reference to the width of the street relatively to the height of the buildings, or the height of the buildings relatively to the width of the street, so as to secure as far as possible that the maximum height of the front walls of such buildings on each side thereof shall not exceed the space between such front walls, except in the case of public buildings, the height of which shall be in the discretion of the Dean of Guild . . . and every such condition shall be enforceable and carried into effect by the Master of Works."

Section 364—"Every person who intends to erect any building within the city or to alter any such building . . . in a manner which will affect the exterior dimensions thereof . . . shall make application to the Dean of Guild for a warrant to do so."

On 24th December 1896 the Dean of Guild pronounced an interlocutor, in which, after certain findings in fact, he found "that it is not incompetent for the Dean of Guild to grant warrant for the erection of buildings of the description proposed;" therefore repelled the objections and granted warrant as craved.

*Note.*—"It appears clearly from the last portion of section 290 of the Glasgow Police Act 1866 that the Legislature considered it contrary to the public interest that the front walls of dwelling-houses should exceed in height the width of the street. But it is equally clear that the Legislature did not consider it contrary to the public interest that the front walls of buildings other than dwelling-houses should exceed in height the width of the street by not more than one-fourth in case of streets above forty feet wide. Taking the view of the Legislature as expressed in this part of section 290, the petitioner's proposed buildings not being dwelling-houses, and not exceeding by one-fourth the width of the street, are not open to objection. But this part of section 290 only applies in its terms to streets declared public by the Police Commissioners, not to streets sanctioned as public by the Dean of Guild. There is no reason at all why Napiershall Street should not have been made a public street by the Police Commissioners instead of by the Dean of Guild, and it cannot affect the public interest in the height of the buildings whether it has been made a public street in the one way or the other. But certainly the terms of section 291 relating to streets sanctioned as public by the Dean of Guild create considerable difficulty, and Napiershall Street is in this position. The Dean of Guild may impose conditions so as to secure as far as possible that the

maximum height of the front walls of 'buildings' shall not exceed the space between the front walls (*i.e.*, the width of the street), except in case of 'public buildings,' the height of which is in the discretion of the Dean of Guild. No definition is given of 'public buildings,' but it can scarcely be made to include every building other than a dwelling-house, to follow the phraseology of section 290. But the Dean of Guild is given in section 291 a certain discretion as to imposing conditions in regard to the height of buildings relative to the street, and he can hardly be wrong in exercising this discretion to sanction buildings of a height that the Legislature considers in section 290 unobjectionable except in cases of dwelling-houses. As the Dean of Guild thinks the lining should be granted, it is not necessary to consider whether the conditions as to height referred to in section 291 have been made operative by the proceedings in the lining of the street, or if not, whether they can be made operative in this lining."

The Master of Works appealed, and argued—It was *ultra vires* of the Dean of Guild to grant warrant. It had been determined for all time coming in the Dean of Guild Court in 1872 what the height of the buildings and the breadth of the street were to be, and the petitioner was not entitled to go beyond that decision. If that were not the effect of a lining granted under secs. 290 and 291 of the statute, no one who bought property in a street would have any assurance that the amenity and salubrity of the street would not be interfered with by the erection of buildings much higher than those erected at the original laying out of the street.

The respondent's argument sufficiently appears from the opinions of the Lord President and Lord M'Laren.

**LORD PRESIDENT**—This application to the Dean of Guild is made under the 364th section of the Glasgow Police Act of 1866. That is a provision that application must be made to the Dean of Guild before any building is erected or altered within the burgh.

Now, so far as that section is concerned, there is no prohibition or limitation such as is sought to be enforced by the Master of Works. He makes appeal, however, to another set of sections, *viz.*, 290 and 291, and he says that as matter of fact this street was authorised to be constructed under section 290, that in the application to the Dean of Guild for authority to construct the street it was stated to be the intention of the applicant that the houses should be 60 feet of a maximum height, and that warrant to construct the street was granted in terms of the application. The argument founded upon this section is that the warrant of the Dean of Guild imposes a perpetual limitation upon the applicant to this Court restricting him to buildings of 60 feet and no higher. I must own that that is a somewhat startling conclusion. It would come to this, that

however modest might be the height of the houses proposed to be built at the time when the authority for forming the street is obtained, that height is stereotyped to the end of time. The matter stands thus, that suppose in 1872 somebody was minded, on a perhaps somewhat lavish scale of building, to have a street 60 feet wide, with buildings of 20 feet in height, and he frankly stated that that was his intention, the imprimatur of the Dean of Guild warranting the street would impose the limitation that no houses there should ever be higher than 20 feet. That is a very strong proposition.

But when sections 290 and 291 are examined, it seems to me that no such conclusion is necessitated by their terms. As I read section 290 its purpose is this—No one shall make a street within the burgh except with the authority of the Dean of Guild. In order to judge of the sufficiency of the street in point of width and construction, the Dean has to be told what, in the end, are the intentions of the proprietor about the street, whether it is to be a private or a public street. If a public street, then he says—"Let me hear what is the height of your buildings and I will authorise a street which will be suitable for that purpose." But it seems to me that when once a street has been authorised to be constructed, with due regard to its capacities for what may be its ultimate destination, it is in nowise necessary for the protection of any interest which has been pointed out to us that the erection of buildings in that street shall be further limited than by the ordinary rules which are applicable within burghs. The height of houses has been determined, not from a consideration of the width of the street, but from other considerations. But the height of the houses was not fixed on a uniform scale, and depended upon the existing intentions of the proprietors. It did not at all follow that there might not be circumstances in which a street might be found to be suitable for other purposes in which larger buildings would be required, and to hark back to the original intention of the proprietors and what was the original provision as to the breadth of the street, could only affect the new question in so far as the breadth of the street was or was not sufficient for the height of the proposed new buildings. I think that the conclusion arrived at by the Dean of Guild in his interlocutor is perfectly right, and that we should dismiss the appeal and affirm his judgment.

LORD ADAM concurred.

LORD M'LAREN—I am of the same opinion, with every desire to do full justice to those provisions of the Police Acts of Glasgow and other cities that are intended to secure the health and comfort of the people who inhabit the streets. No one can doubt that it is very desirable that in laying out a new quarter of a town some general regulations should be made

proportioning the height of the buildings to the width of the streets, and practically the air space in connection with them. But it is a very different proposition to affirm that after this is done all alterations from the original design shall be prohibited. If that had been intended I should have expected to find a specific declaration in the statute to some such effect; but, on the contrary, we see indications that these restrictions are not intended to be perpetual, one of them being that in the petition to form the street the applicant is only directed to state what his intention is with reference to the buildings that are to be placed along the sides of the street. In the present case, if the Dean of Guild Court had been considering a new application to put up this street, apparently it could have been the right of the proprietor if he elected to put up commercial buildings instead of dwelling-houses, to increase the height of these by one-fourth for reasons which are obvious enough and really do not enter into the argument. And all that the Dean of Guild has done is to give to the present proprietor for his sausage factory that height which he might have had if his building had been erected at the time when the street was originally laid out. It cannot therefore be said that the interlocutor contravenes in any way the spirit of the Act of Parliament, and I am not convinced that it has in fact infringed any of the conditions of the Act which have been brought before us. I should have been sorry to come to a different conclusion in the case, because I think that these provisions, intended for health and amenity, are much more likely to be successful and to be worked out with the goodwill of those who are affected by them when they are not enforced in a rigid and arbitrary manner, but with what I venture to think is the degree of freedom which the statute allows.

LORD KINNEAR concurred.

The Court dismissed the appeal and affirmed the interlocutor of the Dean of Guild.

Counsel for the Petitioner and Respondent—Clyde. Agents—Simpson & Marwick W.S.

Counsel for the Defender and Appellant—Lees—Maclaren. Agents—Campbell & Smith, S.S.C.